

*United States Court of Appeals
for the
District of Columbia Circuit*



**TRANSCRIPT OF
RECORD**

JOINT APPENDIX

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 20,398

~~364~~

WWIZ, INC.,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee.

ON APPEAL FROM ORDERS AND DECISIONS OF
THE FEDERAL COMMUNICATIONS COMMISSION

United States Court of Appeals
for the District of Columbia Circuit

FILED DEC 5 1966

Nathan J. Paulson
CLERK

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(R. 2)

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Application of)
WWIZ, Inc.) Docket No. 14537
Lorain, Ohio) File No. BR-3707
For Renewal of License)

REQUEST FOR STAY OF COMMISSION'S DECISION

On May 25, 1966, the Commission published in the Federal Register (Vol. 31, No. 101, p. 7533) its May 18, 1966 notice that under its final decision in WWIZ, Inc., et al, 36 FCC 561, 2 RR 2d 169; reconsideration den., 37 FCC 685, 3 RR 2d 315, said standard broadcast station WWIZ, licensed to operate on 1380 kc, daytime only, 500 watts power, Lorain, Ohio, must cease operations on July 15, 1966 in accordance with the Commission's denial of the WWIZ, Inc. license renewal application.

WWIZ, Inc. herewith respectfully requests that the Commission stay the effective date on which it must cease operations and on which its authorization will terminate, and postpone until the Commission shall have finally acted upon any and all proposals specifying essentially the same operating characteristics specified in the application of Lorain Community Broadcasting Company, or any and all applications for a construction permit for a new standard broadcast station to operate on the frequency now licensed to WWIZ, Inc. at Lorain, Ohio. For good cause, WWIZ Inc. states as follows:

1. Ever since October 26, 1958 when WWIZ was constructed and licensed and went on the air to operate on 1380 kc, 500 watts power, daytime only, at Lorain, Ohio, pursuant to the grant by the Commission on May 7, 1958 of its application for a construction permit for a new standard broadcast station, it has provided a local outlet for community expression, ample public service time, news, weather,

entertainment, and all-around balanced programming as required by the Communications Act of 1934 and the Commission's rules, to serve the public interest, convenience and necessity.

2. On July 5, 1961, an application for renewal of the WWIZ, Inc. broadcast license was filed with the Commission.

3. On July 13, 1961 a "Petition to Deny" a voluntary transfer of control application filed on June 5, 1961 by WWIZ, Inc. was filed by Elyria-Lorain Broadcasting Company, licensee of station WEOL and WEOL-FM, Elyria, Ohio, a few miles from Lorain, and a competitor with WWIZ in the Lorain market.

4. In its petition to deny the WWIZ transfer of control application, WEOL alleged that WWIZ, Inc. had effected an unauthorized transfer of actual control to the Lorain Journal Company, and that the WWIZ transfer of control application was "an attempt to legitimize the illegal control of WWIZ, Inc. by the Journal and to secure Commission approval of a blatant attempt to traffic in a license; that the reasons stated by Schafitz for selling the balance of his stock in WWIZ, Inc. (to provide additional financing and time to the operations of station WXTX, Youngstown, Ohio) are spurious; and that the above facts constitute the in-and-out story of a promoter," according to the Commission's order of March 1, 1962, designating the WWIZ applications for a hearing.

5. The Commission's order designating the applications for hearing did not frame any issues respecting the quality, content, balance, or any other aspect of WWIZ's programming, i.e., whether the radio service it provided to the listening public in the Lorain area in any way failed the statutory obligation of a licensee to utilize a frequency to serve the public interest, convenience and necessity.

6. The March 6, 1963 Initial Decision by the Hearing Examiner granting both the WWIZ license renewal and transfer of control applications made no finding that WWIZ's actual broadcast operations were anything but completely consistent

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with the public interest in terms of what went out on the air to listeners.

7. In its March 31, 1964 decision reversing the Hearing Examiner and denying said applications, the Commission itself based its action on an "unauthorized transfer of actual control of Station WWIZ from Schafitz to the Journal" and a finding that "the corporate structure of WWIZ, Inc. constituted a device whereby the Journal could exercise control over the corporation and that the functioning of that structure in actual practice indicates that effective control did not remain with Schafitz but passed to the Journal." There was not the slightest suggestion that WWIZ, Inc. was not utilizing its licensed frequency to broadcast programs serving the public interest.

8. Mr. Schafitz, now the sole stockholder of WWIZ, Inc., is not only the licensee of WFAR, Farrell, Pennsylvania, but as well is an electrical and radio engineer, holds both first class radio telephone and radio telegraph licenses, and first obtained a Class B amateur radio license from the Commission at age 15. He did the engineering on WFAR and has operated it since 1954. He is able, experienced, and the Commission has found him personally to be financially, legally and otherwise qualified to operate broadcast facilities in the public interest.

9. In its order of May 19, 1964 accepting for filing the application of Lorain Community Broadcasting Company, and waiving certain rules in order to do so, the Commission indicates it took such action to "have an opportunity to consider the possibility of providing for continued standard broadcast service in Lorain after WWIZ terminated its operation."

10. The sponsors of Lorain Community seem to be four lawyers, none of whom is in a position to give day to day attention to the operation of a broadcast station; one of them is a patent lawyer, and two of them reside in Washington, one of whom seems to specialize in FCC law practice. Apparently none of them is

qualified by experience, training, or otherwise, to operate a broadcast station, and all seem to be engaged full time in the professional practice of law, a time-consuming profession. There is no assurance that they could or would utilize the WWIZ frequency to serve the Lorain listening audience with day to day programming in the public interest. Moreover, they have no physical facilities with which to conduct broadcast operations.

11. If the WWIZ authorization is terminated on July 15, 1966, as contemplated by the Commission's order, it would appear the Commission has no authority to grant interim operation to a new permittee or licensee, or any other entity, without first affording WSPD, Toledo, Ohio and WTTH, Port Huron, Michigan, a hearing under the Ashbacker doctrine, because of overlap resulting in license modifications. Thus, there is a strong probability the Commission will be confronted with litigation and delay if it terminates the WWIZ authorization before usual administrative and judicial procedures have been followed, and the public would be deprived of a fair, efficient and equitable distribution of radio service as required by Section 307(b) of the 1934 Act.

12. It would be arbitrary for the Commission to require WWIZ, Inc. to cease operations and terminate its authorization on July 15, 1966, since it would result in a forfeiture of WWIZ's investment in land and equipment without just cause in terms of the public interest to be served. Such a forfeiture could only be justified if it were shown by substantial evidence that some one other than Schafitz owned or actually controlled the station, or that the programs being broadcast were contrary to the public interest. The Commission knows and can take administrative and judicial notice of the fact that the WWIZ, Inc. stock in the hands of the Journal has been returned in the light of the Commission's findings, and Schafitz owns 100% of same, and of the fact that the WWIZ broadcast operations are serving the Lorain listeners in accordance with the Act.

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The Commission can only deny a renewal of license, or terminate an authorization to accomplish a stated purpose of the 1934 Act, and it cannot do so for a purely punitive purpose.

13. Sanford Schafitz as an individual expects to file an application for a construction permit involving a proposal specifying essentially the same operating characteristics specified in the application of the Lorain Community Broadcasting Company, as provided in the Commission's public notice of May 19, 1966, in Fed. Reg. Vol. 31, No. 101, p. 7533, and to request authority for interim authority to operate WWIZ's facilities.

WHEREFORE, the premises considered, WWIZ, Inc. respectfully requests that the Commission's decision requiring WWIZ, Inc. to cease operations and terminating its authorization on July 1, 1966 be stayed.

Respectfully submitted,

WWIZ, Inc.

By:

(Signed) Carl L. Shipley
Carl L. Shipley
Its Attorney

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of June, 1966, copies of the foregoing Petition for Stay of Commission's Decision were mailed, first class, postage prepaid to:

Cohn and Marks
Cafritz Building
Washington, D.C. 20006
Counsel for Elyria-Lorain
Broadcasting Company

Chief, Broadcast Bureau
Federal Communications Commission
Washington, D.C.

(Signed) Carl L. Shipley
Carl L. Shipley

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20054

In re Application of)
WWIZ, INC.) Docket No. 14537
Lorain, Ohio) File No. BR-3707
For Review of License)

PETITION TO SET ASIDE ORDER, REOPEN
RECORD, AND ENLARGE OR CHANGE THE ISSUES

1. On February 21, 1962 the Commission designated the above application for license renewal for a hearing in a consolidated proceeding, upon the following pertinent issues:

1. To determine (a) whether, prior to November 12, 1958, there existed between the parties to the application for transfer of control of WWIZ, Inc., and their principals any agreement or understanding to effectuate a transfer of control of WWIZ, Inc. to the Lorain Journal Company, without the prior consent of the Commission; (b) whether there existed between the parties to said application, and their principals, at the time of the execution of the November 12, 1958 stock transfer contract, any agreement or understanding to effectuate a transfer of control of WWIZ, Inc. to the Lorain Journal, without the prior consent of the Commission; (c) whether there existed between the parties to said application, and their principals, at the time of the transfer of 45% of the authorized common stock of WWIZ, Inc. on January 28, 1959, any agreement or understanding to effectuate a transfer of control of WWIZ, Inc. to the Lorain Journal Company without the prior consent of the Commission; (d) whether the execution and/or consummation of the November 12, 1958 stock transfer contract and/or the simultaneous purchase of 100% of the authorized preferred stock of WWIZ, Inc. by the Lorain Journal Company and/or the maintenance of certain corporate records of WWIZ, Inc. by the Lorain Journal Company and/or the election of certain directors and officers of WWIZ, Inc. on November 12, 1958 and/or certain amendments to the by-laws and code of regulations of WWIZ, Inc. and/or the exercise by the Lorain Journal Company of certain authority over the expenditures of WWIZ, Inc. were designed to effectuate a transfer of control of WWIZ, Inc. to the Lorain Journal Company without the prior consent of the Commission; (e) whether, as a result of the above actions, control of WWIZ, Inc. was transferred to the Lorain Journal Company without the prior consent of the Commission; and (f) whether the Lorain Journal Company has exercised control over WWIZ, Inc. without the prior consent of the Commission.

2. To determine whether WWIZ, Inc. has failed to furnish the information required by the application form and/or has failed to prosecute its application (BR-3707) for renewal of license of Station WWIZ; and if so, whether said application should be dismissed pursuant to Sections 1.304 and 1.312 of the Commission's Rules.
3. To determine whether, during the past license period of Station WWIZ, WWIZ, Inc. violated the provisions of Sections 3.93(c), 3.111 and 3.113 of the Commission's Rules.

* * * * *

7. To determine whether, in light of the evidence adduced with respect to the foregoing issues, the above-captioned applicants possess the requisite qualifications to be licensees of the Commission.
8. To determine whether, in light of the evidence adduced with respect to the foregoing issues, a grant of any of the above-captioned applications would serve the public interest, convenience or necessity.

2. Said action by the Commission was instigated by a "Petition to Deny" filed by Elyria-Lorain Broadcasting Company, Elyria, Ohio, licensee of WEOL and WEOL-FM, which compete for business in the Lorain market with WWIZ, Inc.

3. As indicated in the Commission's order of February 21, 1962, WEOL charged WWIZ, its competitor with "an attempt to legitimize the illegal control of WWIZ, Inc. by the Journal and to secure Commission approval of a blatant attempt to traffic in a license that the reasons stated by Schafitz for selling the balance of his stock in WWIZ, Inc. to provide additional financing and time to the operations of Station WXTV, Youngstown, Ohio are spurious; and that the above facts constitute the in-and-out story of a promoter of a construction permit, which led ultimately to the Commission's order designating WWIZ, Inc.'s license renewal application for hearing on basic issues involving transfer of control."

4. As a result of the hearing on the above cited pertinent issues, the Commission rendered a decision ordering WWIZ, Inc. to cease operations and terminating its authorization, which said order is scheduled to become effective July 15, 1966. (31 Fed. Reg. 7533, May 25, 1966).

5. As outlined herein, the principal instigator of the hearing on WWIZ, Inc.'s application for renewal of its broadcast license was the Elyria-Lorain Broadcasting Company, licensee of radio station WEOL, located in Elyria, Ohio, near Lorain and serving the Lorain market in competition with WWIZ.

Significantly, the only alternatives for decision under the issue as framed was a grant or denial of WWIZ's application for renewal of its broadcast license. Although the Hearing Examiner in his initial decision granted the WWIZ license renewal application, the Federal Communications Commission reversed the initial decision and denied the application in a decision dated March 31, 1964, which was ultimately sustained by the United States Court of Appeals, whose decision in turn was the subject of the petition for writ of certiorari herein, the U. S. Supreme which ~~the~~ Court denied on April 4, 1966. The petition for writ of certiorari the U. S. Supreme was filed in ~~the~~ Court on February 15, 1966.

After WEOL had successfully brought about the denial of the application for renewal of the broadcast license of its competitor in the Lorain, Ohio market, WWIZ, Inc., broadcasting station WEOL in an ironic turn of events found itself hoisted on its own petard.

Upon the complaint of the Lorain Journal Company filed on July 27, 1964 requesting the Federal Communications Commission to deny the renewal application of WEOL on grounds of an unauthorized transfer of control (Elyria-Lorain Broadcasting Co., licensee of WEOL conceded that by December 12, 1960 over 50% of its stock had been transferred without authorization to newcomers upon whose qualifications the Federal Communications Commission had not passed, through a series of small transfers over the period from 1947 to 1960), the Federal Communications Commission on September 29, 1965 designated for hearing the WEOL application for renewal of broadcast license on issues involving an unauthorized transfer of control, which permitted the Hearing Examiner to impose several

lesser penalties than outright denial of the renewal application, as contrasted with the "sudden death" issue applied in WWIZ's renewal application hearing, as follows:

- "1. To determine whether The Lorain County Printing and Publishing Company assumed control of the licensee of Stations WEOL AM & FM, Elyria, Ohio, in violation of Section 310(b) of the Communications Act of 1934, as amended.
- "2. To determine, in light of the evidence adduced pursuant to the first issue listed above, whether a forfeiture in the amount of \$10,000 or some lesser sum should be ordered; and whether a Cease and Desist Order should be issued.
- "3. To determine, in light of the evidence adduced pursuant to the first and second issues listed above, whether any grant of the renewal applications should be subject to the condition that The Lorain County Printing and Publishing Company divest itself of any or all its interest in the licensee.
- "4. To determine, in light of the evidence adduced pursuant to the foregoing issues, whether a grant of the above-captioned applications would serve the public interest, convenience, and necessity."

Thereafter, the Lorain Journal on October 15, 1965 filed a petition with the Federal Communications Commission to modify the Hearing Order to include not only a de facto transfer of control, but any de jure transfer of control, on grounds that the Federal Communications Commission's stated policy in Melody Music, Inc. v. FCC, 345 F.2d 730, 4 R.R.2d 2020, requires equal treatment of applicants charged with similar violations of the FCC's rules, i.e., unauthorized transfer of control. On February 7, 1966, the Commission denied said petition and on February 24, 1966, the Commission denied a request that WEOL be required to produce the same documents and papers which it had required WWIZ to produce, and which formed the basis for the Federal Communications Commission's ultimate decision denying WWIZ's license renewal application.

6. The Commission itself has indicated that licensees should be given equal treatment procedurally where the offenses alleged are substantially the same. Melody Music, Inc. v. FCC, 345 F 2d 730, 4, RR 2d 2029. As stated by the

Commission in its February 4, 1966 order relating to the WEOL license renewal hearing, "As far as we are able to determine, however, the possibility of a conditional grant was not raised in WWIZ."

Petitioner respectfully points out that at the time its license renewal application was designated for hearing on WEOL's complaint alleging unauthorized transfer of control, petitioner did not know and had no way of knowing (1) that WEOL itself had during 1960 transferred control without FCC authority and either negligently or willfully failed to seek prior FCC consent or report same, and (2) the Commission, in designating the WEOL license renewal application for hearing would frame entirely different and far more favorable issues which could lead to a finding of a penalty of "forfeiture in the amount of \$10,000 or some lesser sum," or "whether a Cease and Desist Order should be issued" as sanctions, instead of the total forfeiture of license as the only alternative to renewal permitted by the WWIZ hearing issues, or would consider a conditional grant sua sponte for WEOL. Moreover, the Commission framed the issues in the WEOL proceeding just as it did in the WWIZ proceeding, and did not depend upon WEOL to raise the possibility of a conditional grant.

Petitioner verily believes the Commission was arbitrary in framing issues for WWIZ which limited the hearing to renewal or denial of license renewal, on WEOL's allegations of unauthorized transfer of control, but framing issues involving a choice ~~of~~ lesser sanctions for WEOL, on Lorain Journal's allegations of unauthorized control. The Supreme Court has held that constitutional due process applies to administrative proceedings. Greene v. McElroy, 360 U.S. 474. Petitioner verily believes due process involves the framing of issues which permit the parties and Hearing Examiner to consider lesser sanctions than denial of a license renewal application for WWIZ as well as for WEOL, where economic competition has been the motive behind WEOL's efforts to destroy WWIZ, Inc.

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7. In WMOZ, Inc. v. FCC, 120 U.S. App. D.C. 103, 344, F.2d 197, the U.S. Court of Appeals held that the Commission must reopen the record to determine whether a license renewal denial was the product of a conspiratorial competitor's effort to destroy a station and drive it out of business. (See Commission's Order (FCC 66-417, released May 12, 1966). As provided in 47 CFR 1.229, the Commission can take official notice of the fact that WEOL has for a decade engaged in a competitive battle with Lorain Journal to keep that newspaper out of broadcast competition with WEOL, and that WWIZ, Inc. is to some extent a victim of fall-out from that titanic and perpetual combat, during which WEOL has sought to use the FCC's procedures as a sword in its arsenal to maintain its competitive monopoly as against Lorain Journal.

8. Because of the grossly different hearing issues framed sua sponte by the Commission in the WWIZ and WEOL matters, despite the same alleged derelictions, and the failure of the Commission to include lesser sanction issues for WWIZ on its own motion, and because WWIZ could not then know the Commission would be disposed to take such action for WEOL in a similar situation, WWIZ, Inc. respectfully requests the Commission to set aside its decision in the WWIZ, Inc. proceeding (FCC 64-249, released March 31, 1964 and FCC 64-352, released April 24, 1964), frame new issues for WWIZ the same as those framed in the WEOL proceeding (FCC 65-857, released September 29, 1965, and FCC 66 R-50, released February 7, 1966), and reopen the record to allow WWIZ and other interested parties an opportunity to adduce evidence, cross-examine witnesses, and otherwise protect its substantial interests.

WHEREFORE, the premises considered, WWIZ, Inc. respectfully requests the Commission to take the actions necessary to accomplish the above outlined purposes.

Respectfully submitted,

WWIZ, Inc.

By: (Signed) Carl L. Shipley

Carl L. Shipley
Its Attorney

(R. 14)

[Certificate of Service]

(R. 16)

OPPOSITION OF
THE ELYRIA-LORAIN BROADCASTING COMPANY
TO PETITION TO SET ASIDE ORDER, REOPEN
RECORD, AND ENLARGE OR CHANGE THE ISSUES

The Elyria-Lorain Broadcasting Company (hereinafter referred to as "WEOL"), by its attorneys, respectfully opposes the Petition filed by W.W.I.Z., Inc. (hereinafter referred to as "WWIZ") on June 9, 1966 which seeks to have all of the proceedings in the above-captioned matter set aside, and to have the application become the subject of an entirely new proceeding with somewhat modified hearing issues. In opposition to the WWIZ request, WEOL states:

1. This litigation must at this time be brought to a close. As the Commission is aware, throughout the course of this extremely lengthy proceeding and throughout the course of the lengthy judicial review which followed and affirmed the Commission's Decision, WEOL did not assert

any position with respect to the issues which did not bear directly upon the application for approval of the transfer of control of WWIZ from Schafitz to The Lorain Journal Company. WEOL adduced no evidence and took no position with respect to the other matters involved which were related to the question of the renewal of license of Station WWIZ.^{1/} Presumably, the instant Petition is directed solely to the renewal question. Nevertheless, WEOL must at this time express its opposition to any further continuation of this proceeding.

2. The basic contention of the WWIZ Petition is that the original hearing issues should have expressly permitted the imposition of some lesser penalty than denial of the application for renewal of license of Station WWIZ. WWIZ was free to make this argument at all times during the proceeding which was conducted before the Commission. It points to no change in governing statutory requirements, no change in Commission Rules, and, indeed, to no change in Commission policy which has occurred. Stripped to its essentials WWIZ now urges that the Commission made a mistake many years ago when this proceeding was designated for hearing. After the issuance of the Commission's Decision,

1/ WEOL will not oppose the Request for Stay of Commission's Decision filed in this proceeding by WWIZ simultaneously with the Petition to which the instant Opposition is addressed.

WWIZ filed a Petition for Reconsideration, a Notice of Appeal to the Court of Appeals, briefs in support of its appeal, a Petition for Rehearing En Banc before the Court of Appeals, a Petition for a Writ of Certiorari before the Supreme Court of the United States, and a Petition for Rehearing of the Supreme Court's Order Denying Certiorari. It can hardly be suggested that WWIZ has not had the fullest possible "day in Court."^{2/} It has certainly advanced no sufficient reason for undoing at this stage a proceeding which commenced in 1962 and in which all of the parties and the Commission have expended very considerable time and effort.

3. Moreover, it should by now be clear that the currently pending proceeding involving the applications for renewal of license and transfer of control of Station WEOL (Docket No. 16209, et al), to which WWIZ points as a reason for granting its instant request, has quite a different factual base than did the WWIZ proceeding. Although in the WEOL proceeding the Commission has included an issue to determine

2/ As a matter of fact, the contentions contained in the instant Petition are derived in large part from the Petition for Rehearing filed with the Supreme Court, which was denied on May 16, 1966. Page 3 of the instant Petition even contains a sentence stating that the Petition for Writ of Certiorari was filed "in this Court" on February 15, 1966.

whether a forfeiture or a Cease and Desist Order should be issued, this issue and the sanction it permits is related expressly to only one other issue -- the issue of whether control of the licensee of Station WEOL had been illegally assumed by The Lorain County Printing and Publishing Company. The Commission's Memorandum Opinion which designated that case for hearing stated the concession by the applicant that control had improperly been transferred, and the Commission noted that if the facts supported the applicant's version of this transaction Commission consent might have been given without further action. Nowhere in the WWIZ Designation Order was there any suggestion that the facts under consideration might reflect a violation of such a minor nature that a fine or Cease and Desist Order might have been appropriate. This critical distinction provides more than adequate support for the Commission to designate different issues in the two proceedings. And, of course, the record and the Commission's findings in the WWIZ proceeding, which were affirmed by the Court of Appeals, established deliberate misrepresentations and a conspiracy to transfer control illegally. It is difficult to conceive how the type of issue now requested by WWIZ could possibly affect the final outcome of the WWIZ proceeding. Nowhere in the instant Petition does WWIZ

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suggest why the issue which it now requests might be appropriate in light of the facts determined by the Commission.

Respectfully submitted

THE ELYRIA-LORAIN
BROADCASTING COMPANY

By _____
Marcus Cohn

By _____
Stanley S. Neustadt
Cohn and Marks
317 Cafritz Building
Washington, D. C. 20006
Its Attorneys

June 16, 1966

(R. 21)

[Certificate of Service]

Before the
Federal Communications Commission
Washington, D. C.

In re Application of)
WWIZ, Inc.) Docket No. 14537
Lorain, Ohio)
For Renewal of License) File No. BR-3707
Before the Commission: 1 /)

**OPPOSITION TO REQUEST FOR STAY
OF COMMISSION'S DECISION**

Lorain Community Broadcasting Company, by its attorneys,
submits this opposition to the request filed on June 9, 1966, by WWIZ,
Inc. for stay of the Commission's decision of May 18, 1966, directing
that Station WWIZ cease operation on July 15, 1966. The following is
submitted in support of this opposition:

1. The WWIZ stay request is clearly a last desperate attempt by a discredited licensee to keep operating for a few weeks or months so that the last available revenue may be collected prior to termination. The request should be dismissed or denied by the Commission without delay to discourage such tactics in the future.

1 / Contrary to the provisions of Section 1.209 of the Commission's Rules, WWIZ, Inc., has failed to indicate in the caption of its Request for Stay the branch of the Commission which is to pass upon its request. It appears that the Commission en banc is the appropriate forum.

2. It is not necessary to repeat in detail the outcome of the proceedings in this case. It is sufficient to state that WWIZ, Inc., has been disqualified as a licensee and that it has exhausted all available opportunities for judicial review.^{2 /} The sole basis for the request to maintain service under this discredited licensee is the claim that the WWIZ programming serves the public interest, and that this programming has not been criticized by the Commission. This argument misses the point, however. The nature of a licensee's program service becomes irrelevant when that licensee is disqualified by misconduct. Federal Communications Commission v. WOKO, Inc., 329 U.S. 223.

3. The asserted need to maintain continuity of local programming on WWIZ is not persuasive. Lorain Community Broadcasting Company stands ready to render service on the facilities occupied by WWIZ, on a permanent or on an interim basis, as shown by its application on file with the Commission.^{3 /}

2 / Citations to the history of litigation concerning this licensee are set forth in extenso in Footnote 1 to the Commission's Memorandum Opinion and Order of May 18, 1966 in this case.

3 / It should be noted that WWIZ apparently does not understand the composition of applicant Lorain Community Broadcasting Company (See para 10 of request), but its misunderstanding is not relevant to consideration of problems raised by the request.

This service will be expedited if Lorain Community Broadcasting Company is able to purchase the facilities currently utilized by WWIZ, as it has proposed to do. Presumably the current licensee will not sell these facilities as long as it has any hope that its pending request for stay will be granted. Consequently, it is respectfully suggested that continuity of service will be expedited by immediate Commission action denying this request for stay.

4. The WWIZ, Inc. argument at paragraph 11 concerning the Ashbacker doctrine is without any merit. In the first place, the Ashbacker case has nothing to do with the overlap situation described in paragraph 11.^{4/} It must be assumed that WWIZ, Inc. is actually referring to rights which an existing licensee may claim to resist modification of its license under Section 316 of the Communications Act. See, e. g. Federal Communications Commission v. National Broadcasting Company (KOA), 319 U. S. 239. However, it cannot be claimed that an existing license is modified when an existing facility is maintained at current levels of technical operation.

4/ The case stands basically for the proposition that mutually exclusive applicants are entitled to a hearing. Ashbacker Radio Corp. v. Federal Communications Commission, 326 U. S. 327.

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5. Finally, the assertion by WWIZ, Inc. that Sanford Schafitz plans to file for the WWIZ facility has no relevance to this case. Mr. Schafitz is controlling shareholder of WWIZ, Inc. His qualifications as a licensee are no greater than those of the corporation he controls. The fact that he may briefly have an application pending is irrelevant, since it is so clear that it must be dismissed without consideration as a repetitious application under Section 1.519 of the Commission's rules. See Public Service Television, Inc. v. Federal Communications Commission, 115 U.S. App. D. C. 200.

In summary, the WWIZ, Inc., request for stay is a clear last desperate attempt to maintain a profitable operation for some brief indeterminate period. Prompt denial of the request will serve the public interest and encourage disposition of the technical physical assets to a qualified operator.

Respectfully submitted,

Lorain Community Broadcasting Company

June 17, 1966

By Robert A. Marmet
Robert A. Marmet

Edwin R. Schneider, Jr.
Edwin R. Schneider, Jr.
Its Attorneys
Marmet & Schneider
1822 Jefferson Place
Washington, D. C. 20036

(R. 21)

[Certificate of Service]

(R. 27)

[Released July 8, 1966]

MEMORANDUM OPINION AND ORDER

By the Commission: Commissioner Bartley dissenting; Commissioners Cox and Johnson not participating.

1. The Commission has under consideration: the matters of record in the proceedings herein; its decision released March 31, 1964 (36 F.C.C. 562, 2 RR 2nd 169) which, inter alia, denied the application of WWIZ, Inc. for renewal of license of Station WWIZ, Lorain, Ohio; the Commission's Order (36 F.C.C. 924, adopted April 22, 1964) providing that in the event of a petition for reconsideration of the Commission's decision or an appeal from such decision is timely filed, WWIZ shall cease operation and/or its authorization shall terminate 60 days after denial of the petition for reconsideration and/or the judicial affirmance of the Commission's decision; the Commission's Memorandum Opinion and Order (37 F.C.C. 685, adopted September 16, 1964) which denied WWIZ, Inc.'s petition for reconsideration of the Commission's decision's; the request for stay of the above-described decision, filed June 9, 1966, by WWIZ, Inc.; and the opposition thereto, filed June 17, 1966, by Lorain Community Broadcasting Company.

2. The United States Court of Appeals for the District of Columbia Circuit, on September 8, 1965, affirmed the Commission's decision and its denial of the petition for reconsideration of that decision. The Lorain Journal Company v. F.C.C. , ___ U.S. App. D.C. ___, 351 F. 2d 824, 5 RR 2d 2111; petition for rehearing en banc denied November 19, 1965. The Supreme Court of the United States on April 4, 1966 denied the petition for writ of certiorari filed by WWIZ, Inc. (383 U.S. 967), and on May 16, 1966, that Court denied a petition for rehearing filed by WWIZ, Inc. (___ U.S. ___, 86 S. Ct. 1455). Accordingly, pursuant to the Commission's Order of April 22, 1964, supra and the Commission's Public Notice (FCC 66-441, 31 F.R. 7533), released May 19, 1966, Station WWIZ must cease operation on July 15, 1966.

3. The Commission is of the opinion that it would serve the public interest to allow WWIZ, Inc. to continue operation of Station WWIZ for ninety (90) days, or until October 13, 1966, to afford the Commission the

(R. 28)

opportunity to consider any applications proposing to utilize, both on a permanent and on an interim basis the frequency presently assigned to Station WWIZ.

4. ACCORDINGLY, IT IS ORDERED, This 7th day of July, 1966, That WWIZ, Inc. IS HEREBY AUTHORIZED to continue operation of Station WWIZ until the end of the broadcast day on October 13, 1966.

FEDERAL COMMUNICATIONS COMMISSION

Ben F. Waple
Secretary

(R. 30)

[Released July 28, 1966]

MEMORANDUM OPINION AND ORDER

By the Commission: Commissioners Cox and Johnson not participating

1. The Commission has before it for consideration (a) a petition to set aside order, reopen the record, and enlarge or change the issues in the above-caption proceeding, filed on June 9, 1966, by WWIZ, Inc. (WWIZ), and (b) an opposition thereto, filed June 16, 1966, by The Elyria-Lorain Broadcasting Company.

2. At this late date ^{1/}, WWIZ requests that the Commission set aside its order of March 25, 1964 (which, *inter alia*, denied WWIZ's application for renewal of license of Station WWIZ), reopen the record therein, and enlarge or change the issues which governed the proceeding. The basis for this request is that lesser sanctions than outright denial of a renewal application were provided in the designation order in the Elyria-Lorain Broadcasting Company proceeding, which also in-

volves questions of unauthorized transfer of control and renewal of broadcast licenses.^{2/} WWIZ submits that the Commission acted arbitrarily in framing issues for WWIZ which limited the hearing to renewal or denial of license renewal, but framing issues involving a choice of lesser sanctions in Elyria-Lorain where the alleged derelictions are the same. WWIZ, therefore, requests the Commission to set aside the decision in the above-captioned proceeding, frame new issues for WWIZ identical to those framed in Elyria-Lorain, and reopen the record to allow WWIZ and other interested parties an opportunity to adduce evidence, cross-examine witnesses, and otherwise

- 1/ At no time heretofore in this proceeding has WWIZ made a request similar to the one presently under consideration. WWIZ has exhausted its appeals from the Commission's orders; most recently, the Supreme Court of the United States denied WWIZ's petition for rehearing before that Court. WWIZ, Inc. v. F.C.C., ___ U.S. ___, 86 S. Ct. 1455 (May 16, 1966).
- 2/ FCC 65-857, 6 RR 2d 191, released September 29, 1965 (Docket Nos. 16209, 16210).

(R. 31)

protect its substantial interests.

3. The end of the judicial process cannot be regarded simply as a signal to begin anew with pleas to the agency. Only a strong and compelling case would warrant taking up the matter again after the agency and judicial process has been completed. No such showing has been made here. See Carol Music, Inc., FCC 66-649, released July 18, 1966. No valid reasons are demonstrated by WWIZ for grant of the relief which it now seeks at such a late date. This untimeliness would warrant its denial at the threshold and for having failed to raise the question previously and at an appropriate occasion before the Commission. However, going on to the substance of WWIZ's proposal, we note that while the two proceedings appear to be similar superficially, a reading of the Orders ^{3/} leading to the designation of the respective proceedings for hearing discloses that the issues specified in each proceeding arose from markedly different factual situations. Unlike the WWIZ sit-

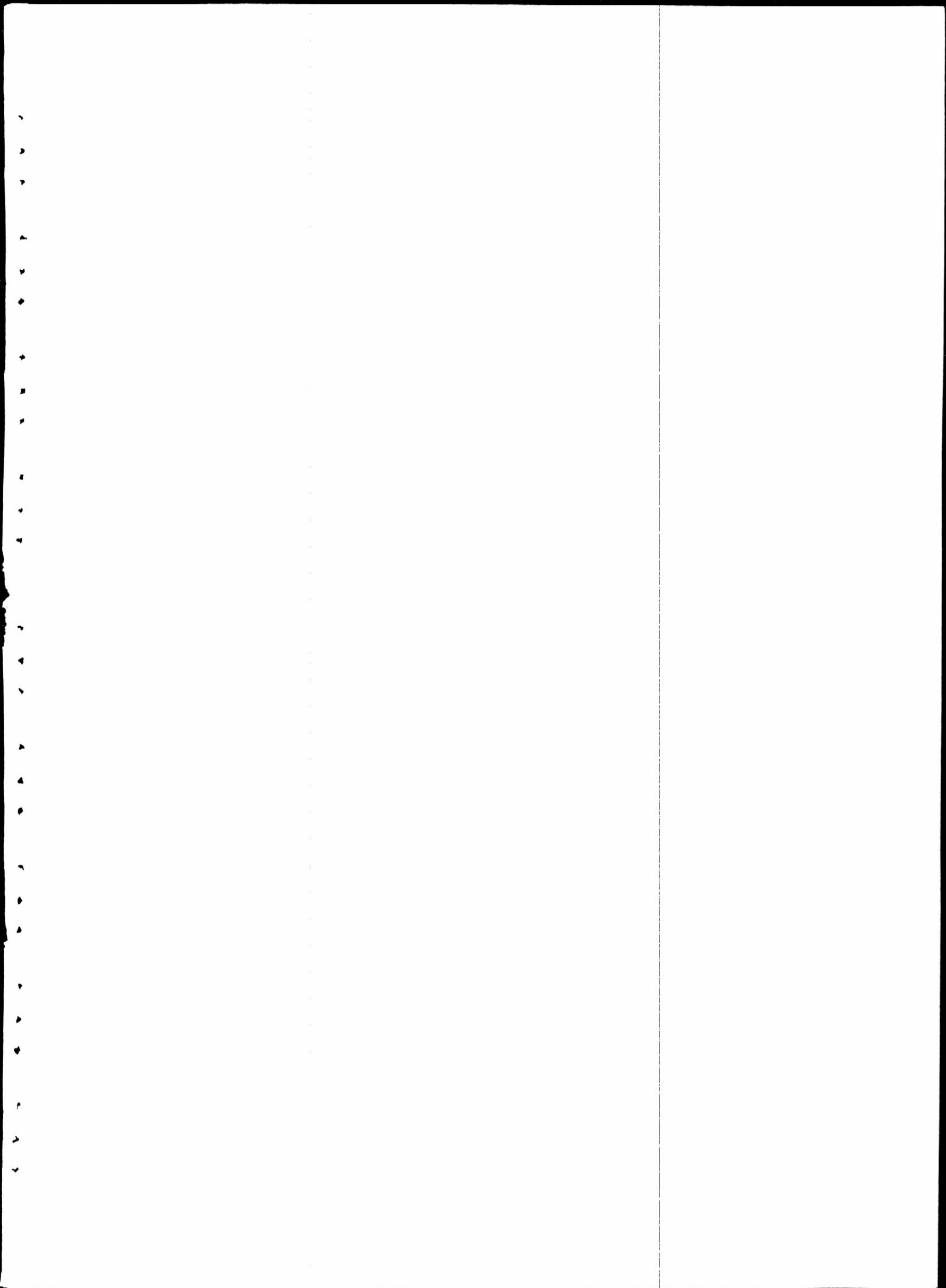
uation, the preliminary information in the Elyria-Lorain proceeding, as discussed in that order of designation, persuaded the Commission that provision should be made for the possible imposition of lesser sanctions than denial of renewal of license, should that action be deemed to be more appropriate in the circumstances reflected in the hearing record. In short, the Commission determined at the outset that the charges in the Elyria-Lorain proceeding appeared to be less serious in nature than those advanced in the WWIZ proceeding; consequently, different issues were called for in Elyria-Lorain. Furthermore, in light of our conclusion that denial of WWIZ renewal was required as the appropriate sanction upon the hearing record before us, the speculative possibility that an alternative sanction might have been specified when the matter was designated is not a relevant factor for our consideration at this time.

4. In view of the foregoing, IT IS ORDERED, This 27th day of July, 1966, that the petition to set aside order, reopen the record, and enlarge or change the issues, filed June 9, 1966, by WWIZ, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Ben F. Waple
Secretary

3/ WWIZ, Inc., FCC 62-223, 22 RR 1073 (1962); Elyria-Lorain Broadcasting Company, FCC 65-857, 6 RR 2d 191 (1965).



APPELLANT'S BRIEF

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 20,398

WWIZ, INC.,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee.

**ON APPEAL FROM OPINION AND ORDER OF
FEDERAL COMMUNICATIONS COMMISSION**

United States Court of Appeals
for the District of Columbia Circuit

FILED OCT 10 1966

CARL L. SHIPLEY

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Of Counsel:

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(i)

STATEMENT OF QUESTIONS PRESENTED

Counsel for the parties entered into a prehearing stipulation that the following question is presented by the instant appeal:

- (a) Whether, in light of the reasons relied upon in appellant's notice of appeal, the Commission properly denied the petition of WWIZ, Inc. to (1) set aside its Order of March 25, 1964, which *inter alia* denied WWIZ's application for renewal of license of station WWIZ; (2) reopen the record therein; and (3) enlarge or change the issues which governed that proceeding.

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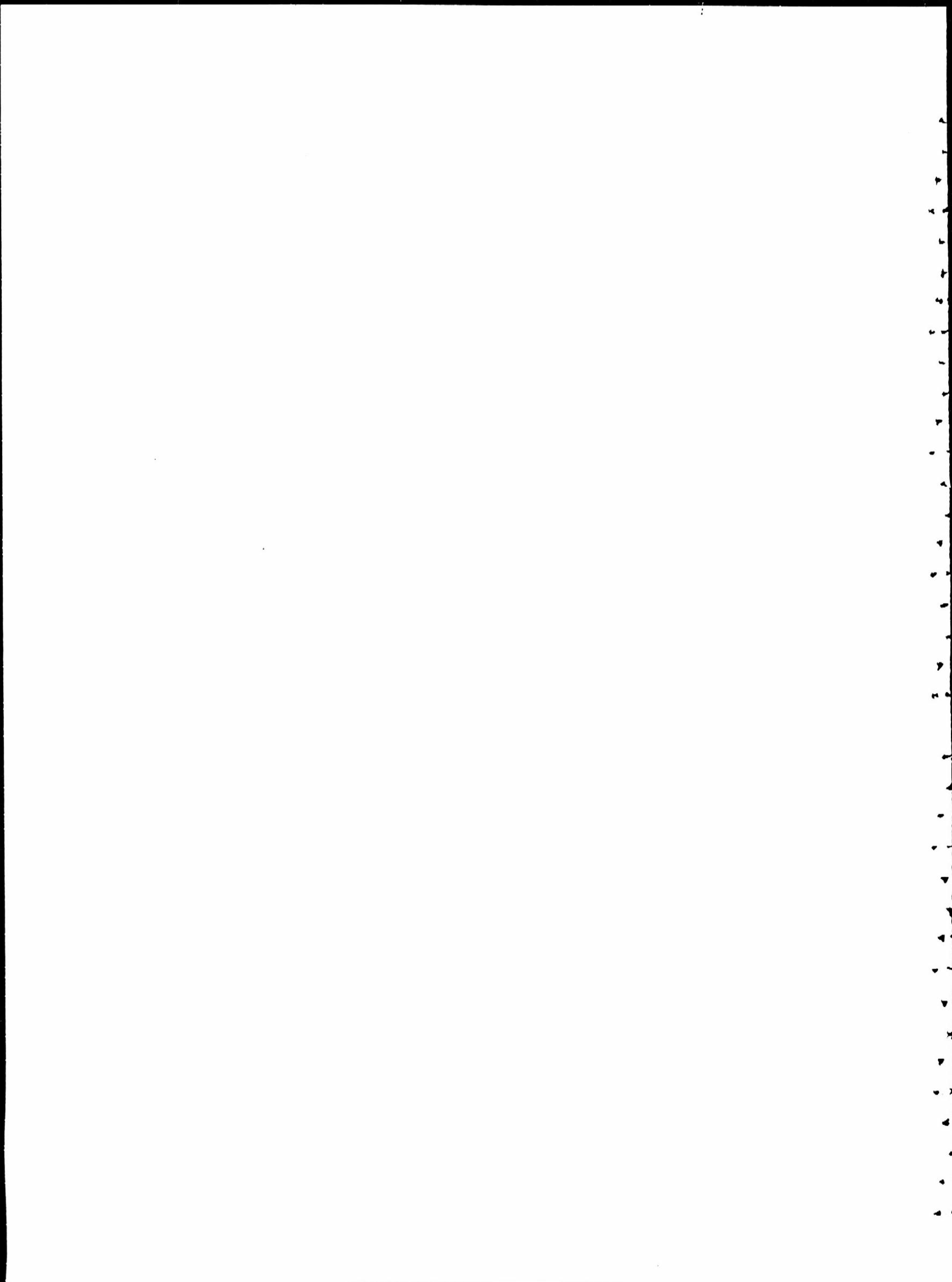
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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 20,398

WWIZ, INC.,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee.

*ON APPEAL FROM OPINION AND ORDER OF
FEDERAL COMMUNICATIONS COMMISSION*

APPELLANT'S BRIEF

STATEMENT OF CASE

WWIZ, Inc. is the licensee of a standard broadcast station operating on 1380 kc, 500 w power, daytime only, at Lorain, Ohio. On March 25, 1964 the Federal Communications Commission denied WWIZ's application for renewal of license. Thereafter WWIZ exhausted such procedures and appeals as were available, the final action of which was denial of WWIZ's petition for rehearing before the Supreme Court of the United States on May 16, 1966 (86 S. Ct. 1455). The Commission's

original order (36 FCC 924, adopted April 22, 1964) provided that WWIZ must cease operation and/or its authorization would terminate 60 days after judicial affirmation of the Commission's decision. On June 9, 1966, WWIZ requested the Commission to stay its above-described decision, and on July 7, 1966 the Commission adopted a memorandum opinion and order which provided in pertinent part,

"The Commission is of the opinion that it would serve the public interest to allow WWIZ, Inc. to continue operation of station WWIZ for ninety (90) days, or until October 13, 1966, to afford the Commission the opportunity to consider any application proposing to utilize both on a permanent and on an interim basis, the frequency presently assigned to station WWIZ".

On June 9, 1966, WWIZ, Inc. filed a petition with the Federal Communications Commission requesting it to set aside the order, reopen record, and enlarge or change the issues in the proceeding which led to the Commission's original 1964 order denying its application for renewal of broadcast license.

In said petition, WWIZ, Inc. set forth the fact that the principal instigator of the proceedings which led to denial of WWIZ's license renewal application was the Elyria-Lorain Broadcasting Company, licensee of radio station WEOL, located at Elyria, Ohio, near Lorain, and serving the Lorain market in competition with WWIZ. The records of the Federal Communications Commission clearly indicate that for nearly a decade station WEOL has carried on a campaign to keep Lorain Journal Company, a newspaper publisher in competition with the owners of station WEOL, out of broadcast operations. The sale by WWIZ, Inc. of a minority stock interest to the Lorain Journal Company in 1958 shortly after it commenced business, led to allegations by WEOL that there had been an unauthorized transfer of control, in violation of the FCC's rules, and this in turn led to the ultimate order denying WWIZ, Inc.'s application for license renewal.

In an ironic turn of events in the WEOL-Lorain Journal fracas, the Lorain Journal Company on July 27, 1964 requested the Federal Communications Commission to deny the renewal application of WEOL on grounds of an unauthorized transfer of control, and that station conceded that by December 12, 1960 over 50% of its stock had been transferred without authority to new entities upon whose qualifications the Federal Communications Commission had not passed. On September 29, 1965 the Commission designated the WEOL renewal application for hearing on issues involving an unauthorized transfer of control.

In framing issues for the hearing on WWIZ, Inc.'s license renewal application, the Commission limited the Examiner to a determination of whether or not WWIZ, Inc. possessed the requisite qualifications to be a licensee of the Commission. WWIZ, Inc.'s renewal application was designated for hearing on February 21, 1962. However, when the Commission decided to set the WEOL license application for hearing on September 29, 1965, more than 18 months after WEOL successfully brought about denial of WWIZ's license renewal application, the Commission framed issues permitting the Examiner to determine whether a forfeiture in the amount of \$10,000.00 or some lesser sum should be ordered, or whether a cease and desist order should be issued against WEOL, and omitted any issue of determining whether or not WEOL possessed the requisite qualifications to be a licensee of the Commission.

In each case the Commission took the initiative *sua sponte* in framing the issues, and did not rely upon either WWIZ or WEOL to suggest or propose issues, or establish the guidelines within which the Hearing Examiner was directed to make determinations in his Initial Decision.

In another later and unrelated case the Commission on May 12, 1966 reopened the record in WMOZ, Inc. as a result of this Court's de-

cision in *WMOZ, Inc. v. FCC*, 120 US App. DC 103, 344 F.2d 197, wherein it was held that the Commission must determine whether a license renewal denial was the product of a conspiratorial competitor's effort to destroy a station and drive it out of business. This action involved a new principle not theretofore considered by the Commission or broadcast licensees. Since both the framing of issues in the WEOL hearing and this Court's action in *WMOZ, Inc.*, and the Commission's subsequent reopening of the record, were events which transpired subsequent to the *WWIZ, Inc.* hearing, *WWIZ, Inc.* filed with the Commission the June 9, 1966 petition to reopen the record referred to hereinabove, so that it might receive the same treatment as WEOL and WMOZ. Its petition was denied. This appeal is from that decision and order.

SUMMARY OF ARGUMENT

The Commission's order denying *WWIZ, Inc.*'s petition to set aside its March 25, 1964 order denying appellant's license renewal application, reopen the record therein, and enlarge or change the issues to permit consideration of lesser sanctions and to consider whether said denial was the conspiratorial product of a competitor's effort to destroy *WWIZ* and the Lorain Journal as competitors for advertising revenue in the Lorain, Ohio market, was arbitrary and capricious, and amounted to a denial of appellant's constitutional right to equal protection of the law, due process, and was in effect a denial of appellant's right to a full hearing.

ARGUMENT

This Court has generally applied to the Federal Communications Commission the Fifth Amendment requirement of procedural "due process". *WJR, The Goodwill Station*, 174 F.2d 226, rev. on other grounds, 337 U.S. 265. However, procedural due process has never been a term of fixed and invariable content, *Western Air Lines v. CAB*, 184 F.2d 933, and has been held by this Court to depend on circum-

stances; "arbitrary action is not due process of law", *Schachtmann v. Dulles*, 225 F.2d 938. In considering procedural due process questions, this Court has not been unmindful that due process by Federal administrative agencies includes "equal protection of the laws". *FTC v. Millers National Federation*, 23 F.2d 938. Generally, "due process of law and the equal protection of the laws are secured if the laws operate on all alike, and do not subject the individual to an arbitrary exercise of the powers of government". *Duncan v. Missouri*, 152 U.S. 377, 382. The essence of the right to equal protection of the laws is that all persons similarly situated be treated alike. *Hooker v. Conte*, 143 N.Y.S. 2d 750.

While neither this Court nor the Supreme Court has passed upon the precise question of how and to what extent due process and equal protection of the laws apply to the framing of hearing issues by the Federal Communications Commission, appellant alleges and verily believes that this constitutional protection applies to every substantial phase of the hearing process. The Commission in the instant case on its own motion framed entirely different hearing issues on the same substantial question of unauthorized transfer of control as between WWIZ and WEOL, its competitor, as set forth in the "Petition To Set Aside Order, Reopen Record, and Enlarge or Change the Issues", denial of which is the subject of this appeal, as follows:

"1. On February 21, 1962 the Commission designated the above application for license renewal for a hearing in a consolidated proceeding, upon the following pertinent issues:

- '1. To determine (a) whether, prior to November 12, 1958, there existed between the parties to the application for transfer of control of WWIZ, Inc., and their principals any agreement or understanding to effectuate a transfer of control of WWIZ, Inc. to the Lorain Journal Company, without the prior consent of the Commission; (b) whether there

existed between the parties to said application, and their principals, at the time of the execution of the November 12, 1958 stock transfer contract, any agreement or understanding to effectuate a transfer of control of WWIZ, Inc. to the Lorain Journal, without the prior consent of the Commission; (c) whether there existed between the parties to said application, and their principals, at the time of the transfer of 45% of the authorized common stock of WWIZ, Inc. on January 28, 1959, any agreement or understanding to effectuate a transfer of control of WWIZ, Inc. to the Lorain Journal Company without the prior consent of the Commission; (d) whether the execution and/or consummation of the November 12, 1958 stock transfer contract and/or the simultaneous purchase of 100% of the authorized preferred stock of WWIZ, Inc. by the Lorain Journal Company and/or the maintenance of certain corporate records of WWIZ, Inc. by the Lorain Journal Company and/or the election of certain directors and officers of WWIZ, Inc. on November 12, 1958 and/or certain amendments to the by-laws and code of regulations of WWIZ, Inc. and/or the exercise by the Lorain Journal Company of certain authority over the expenditures of WWIZ, Inc. were designed to effectuate a transfer of control of WWIZ, Inc. to the Lorain Journal Company without the prior consent of the Commission; (e) whether, as a result of the above actions, control of WWIZ, Inc. was transferred to the Lorain Journal Company without the prior consent of the Commission; and (f) whether the Lorain Journal Company has exercised control over WWIZ, Inc. without the prior consent of the Commission.

- '2. To determine whether WWIZ, Inc. has failed to furnish the information required by the application form and/or has failed to prosecute its application (BR-3707) for renewal of license of Station WWIZ; and if so, whether said application should be dismissed pursuant to Sections 1.304 and 1.312 of the Commission's Rules.
- '3. To determine whether, during the past license period of Station WWIZ, WWIZ, Inc. violated the provisions of Sections 3.93(c), 3.111 and 3.113 of the Commission's Rules.

* * *

- '7. To determine whether, in light of the evidence adduced with respect to the foregoing issues, the above-captioned applicants possess the requisite qualifications to be licensees of the Commission.
- '8. To determine whether, in light of the evidence adduced with respect to the foregoing issues, a grant of any of the above-captioned applications would serve the public interest, convenience or necessity.

"2. Said action by the Commission was instigated by a "Petition to Deny" filed by Elyria-Lorain Broadcasting Company, Elyria, Ohio, licensee of WEOL and WEOL-FM, which compete for business in the Lorain market with WWIZ, Inc.

"3. As indicated in the Commission's order of February 21, 1962, WEOL charged WWIZ, its competitor, with "an attempt to legitimize the illegal control of WWIZ, Inc. by the Journal and to secure Commission approval of a blatant attempt to traffic in a license; that the reasons stated by Schafitz for selling the balance of his stock in WWIZ, Inc. to provide additional financing and time to the operations of Station WXTV, Youngstown, Ohio are spurious; and that the above facts constitute the 'in-and-out' story of a promoter of a construction permit," which led ultimately to the Commission's order designating WWIZ, Inc.'s license renewal application for hearing on basic issues involving transfer of control.

"4. As a result of the hearing on the above cited pertinent issues, the Commission rendered a decision ordering WWIZ, Inc. to cease operations and terminating its authorization, which said order is scheduled to become effective July 15, 1966. (31 Fed. Reg. 7533, May 25, 1966).

"5. As outlined herein, the principal instigator of the hearing on WWIZ, Inc.'s application for renewal of its broadcast license was the Elyria-Lorain Broadcasting Company, licensee of radio station WEOL, located in Elyria, Ohio, near Lorain and serving the Lorain market in competition with WWIZ.

"Significantly, the only alternatives for decision under the issue as framed was a grant or denial of WWIZ's application for renewal of its broadcast license. Although the Hearing Examiner in his initial decision granted the WWIZ license renewal application, the Federal Communications Commission reversed the initial decision and denied the application in a decision dated March 31, 1964, which was ultimately sustained by the United States Court of Appeals, whose decision in turn was the subject of the petition for writ of certiorari herein, which this Court denied on April 4, 1966. The petition for writ of certiorari was filed in this Court on February 15, 1966.

"After WEOL had successfully brought about the denial of the application for renewal of the broadcast license of its competitor in the Lorain, Ohio market, WWIZ, Inc., broadcasting station WEOL in an ironic turn of events found itself hoisted on its own petard.

"Upon the complaint of the Lorain Journal Company filed on July 27, 1964 requesting the Federal Communications Commission to deny the renewal application of WEOL on grounds of an unauthorized transfer of control (Elyria-Lorain Broadcasting Co., licensee of WEOL conceded that by December 12, 1960 over 50% of its stock had been transferred without authorization to newcomers upon whose qualifications the Federal Communications Commission had not passed, through a series of small transfers over the period from 1947 to 1960), the Federal Communications Commission on September 29, 1965 designated for hearing the WEOL application for renewal of broadcast license on issues involving an unauthorized transfer of control, which permitted the Hearing Examiner to impose several lesser penalties than outright denial of the renewal application, as contrasted with the "sudden death" issue applied in WWIZ's renewal application hearing, as follows:

- '1. To determine whether The Lorain County Printing and Publishing Company assumed control of the licensee of Stations WEOL AM & FM, Elyria, Ohio,

in violation of Section 310(b) of the Communications Act of 1934, as amended.

- '2. To determine, in light of the evidence adduced pursuant to the first issue listed above, whether a forfeiture in the amount of \$10,000 or some lesser sum should be ordered; and whether a Cease and Desist Order should be issued.
- '3. To determine, in light of the evidence adduced pursuant to the first and second issues listed above, whether any grant of the renewal applications should be subject to the condition that The Lorain County Printing and Publishing Company divest itself of any or all its interest in the licensee.
- '4. To determine, in light of the evidence adduced pursuant to the foregoing issues, whether a grant of the above-captioned applications would serve the public interest, convenience, and necessity."

"Thereafter, the Lorain Journal on October 15, 1965 filed a petition with the Federal Communications Commission to modify the Hearing Order to include not only a *de facto* transfer of control, but any *de jure* transfer of control, on grounds that the Federal Communications Commission's stated policy in *Melody Music, Inc. v. FCC*, 345 F.2d 730, 4 R.R.2d 2020, requires equal treatment of applicants charged with similar violations of the FCC's rules, i.e., unauthorized transfer of control. On February 7, 1966, the Commission denied said petition and on February 24, 1966, the Commission denied a request that WEOL be required to produce the same documents and papers which it had required WWIZ to produce, and which formed the basis for the Federal Communications Commission's ultimate decision denying WWIZ's license renewal application.

"6. The Commission itself has indicated that licensees should be given equal treatment procedurally where the offenses alleged are substantially the same. *Melody Music, Inc. v. FCC*, 345 F.2d 730, 4, RR2d 2029. As stated by the Commission in its February 4, 1966 order relating to the WEOL license renewal hearing, "As far

as we are able to determine, however, the possibility of a conditional grant was not raised in WWIZ."

"Petitioner respectfully points out that at the time its license renewal application was designated for hearing on WEOL's complaint alleging unauthorized transfer of control, petitioner did not know and had no way of knowing (1) that WEOL itself had during 1960 transferred control without FCC authority and either negligently or willfully failed to seek prior FCC consent or report same, and (2) the Commission, in designating the WEOL license renewal application for hearing would frame entirely different and far more favorable issues which could lead to a finding of a penalty of "forfeiture in the amount of \$10,000 or some lesser sum," or "whether a Cease and Desist Order should be issued" as sanctions, instead of the total forfeiture of license as the only alternative to renewal permitted by the WWIZ hearing issues, or would consider a conditional grant *sua sponte* for WEOL. Moreover, the Commission framed the issues in the WEOL proceeding just as it did in the WWIZ proceeding, and did not depend upon WEOL to raise the possibility of a conditional grant.

"Petitioner verily believes the Commission was arbitrary in framing issues for WWIZ which limited the hearing to renewal or denial of license renewal, on WEOL's allegations of unauthorized transfer of control, but framing issues involving a choice for lesser sanctions for WEOL, on Lorain Journal's allegations of unauthorized control. The Supreme Court has held that constitutional due process applies to administrative proceedings. *Greene v. McElroy*, 360 U.S. 474. Petitioner verily believes due process involves the framing of issues which permit the parties and Hearing Examiner to consider lesser sanctions than denial of a license renewal application for WWIZ as well as for WEOL, where economic competition has been the motive behind WEOL's efforts to destroy WWIZ, Inc.

"7. In *WMOZ, Inc. v. FCC*, 120 U.S. App. D.C. 103, 344, F.2d 197, the U.S. Court of Appeals held that the Commission must reopen the record to determine whether a license renewal denial was the product of a conspiratorial competitor's effort to destroy a station and drive it out of business. (See Commission's Order FCC 66-417, released May 12, 1966). As provided in 47 CFR 1.229, the Commission can take official notice of the fact that WEOL has for a decade engaged in a competitive battle with Lorain Journal to keep that newspaper out of broadcast competition with WEOL, and that WWIZ, Inc. is to some extent a victim of fall-out from that titanic and perpetual combat, during which WEOL has sought to use the FCC's procedures as a sword in its arsenal to maintain its competitive monopoly as against Lorain Journal.

"8. Because of the grossly different hearing issues framed *sua sponte* by the Commission in the WWIZ and WEOL matters, despite the same alleged derelictions, and the failure of the Commission to include lesser sanction issues for WWIZ on its own motion, and because WWIZ could not then know the Commission would be disposed to take such action for WEOL in a similar situation, WWIZ, Inc. respectfully requests the Commission to set aside its decision in the WWIZ, Inc. proceeding (FCC 64-249, released March 31, 1964 and FCC 64-352, released April 24, 1964), frame new issues for WWIZ the same as those framed in the WEOL proceeding (FCC 65-857, released September 29, 1965, and FCC 66 R-50, released February 7, 1966), and reopen the record to allow WWIZ and other interested parties an opportunity to adduce evidence, cross-examine witnesses, and otherwise protect its substantial interests.

"WHEREFORE, the premises considered, WWIZ, Inc. respectfully requests the Commission to take the actions necessary to accomplish the above outlined purposes."

Appellant urges upon the Court the fact that the Administrative Procedure Act (5 U.S.C.A. 1001, et seq.) contemplates a hearing in the fullest sense of the word. (par. 1004). The Hearing Examiner is made independent (par. 1004(c), 1007), and is obviously limited to the issues framed by the agency. Thus, the WWIZ hearing issues did not permit evidence or argument on lesser sanctions than outright denial of WWIZ's license renewal application and consequent forfeiture of its business.

The Commission completely overlooked and ignored 5 U.S.C.A. 1004(b) which requires in terms:

"The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment . . .".

This procedure is surely a part of due process and necessary to any full hearing. It was denied to appellant.

Similarly, 5 U.S.C.A. 1008 provides in terms that:

"Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, no withdrawal, suspension, revocation, or annulment of any license shall be lawful *unless* prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements". (emphasis supplied)

Appellant was not given any such notice or "opportunity to demonstrate or achieve compliance" in the WWIZ, Inc. license renewal proceeding, and it would appear the Commission's action is unlawful *per se* under the Administrative Procedure Act, which is another aspect of denial of due process. Certainly unlawful agency action is arbitrary by reason of that fact alone.

As stated in the *WJR* case, *supra*, "an essential element of due process is an opportunity to be heard before the reaching of a judgment" — and this would seem to include all relevant issues, and in framing issues the Commission should not only provide similar issues in similar cases, but all issues in all cases. Neither of these tests was met in the WWIZ license renewal proceeding, and the refusal of the Commission to set aside its order and change the issues was arbitrary and unconstitutional. The Commission's actions in the instant case violate "the rudimentary requirements of fair play" recognized by the Supreme Court in *Morgan v. U.S.*, 304 U.S. 1, as inherent in due process. *cf. St. Joseph Stockyards Co. v. U.S.*, 298 U.S. 38, 74.

The Commission's Order of July 27, 1966, denying appellant's petition to set aside its previous order, reopen the record, and change the issues reveals on its face that at the outset it prejudged appellant before hearing, and limited the scope of the issues in accordance with that pre-judgment, e.g.:

"The Commission determined at the outset that the changes in the Elyria-Lorain proceeding appeared to be less serious in nature than those advanced in the WWIZ proceeding; consequently different issues were called for. . .".

Appellant submits due process contemplates a hearing by a Commission open to persuasion, not closed as a result of pre-judgment, in whole or in part.

CONCLUSION

For the foregoing reasons the Commission's Order of July 27, 1966 should be set aside and this case remanded with directions to the Commission to provide a full hearing on issues similar to those in the WEOL and WMOZ proceedings, as referred to hereinabove.

Respectfully submitted,

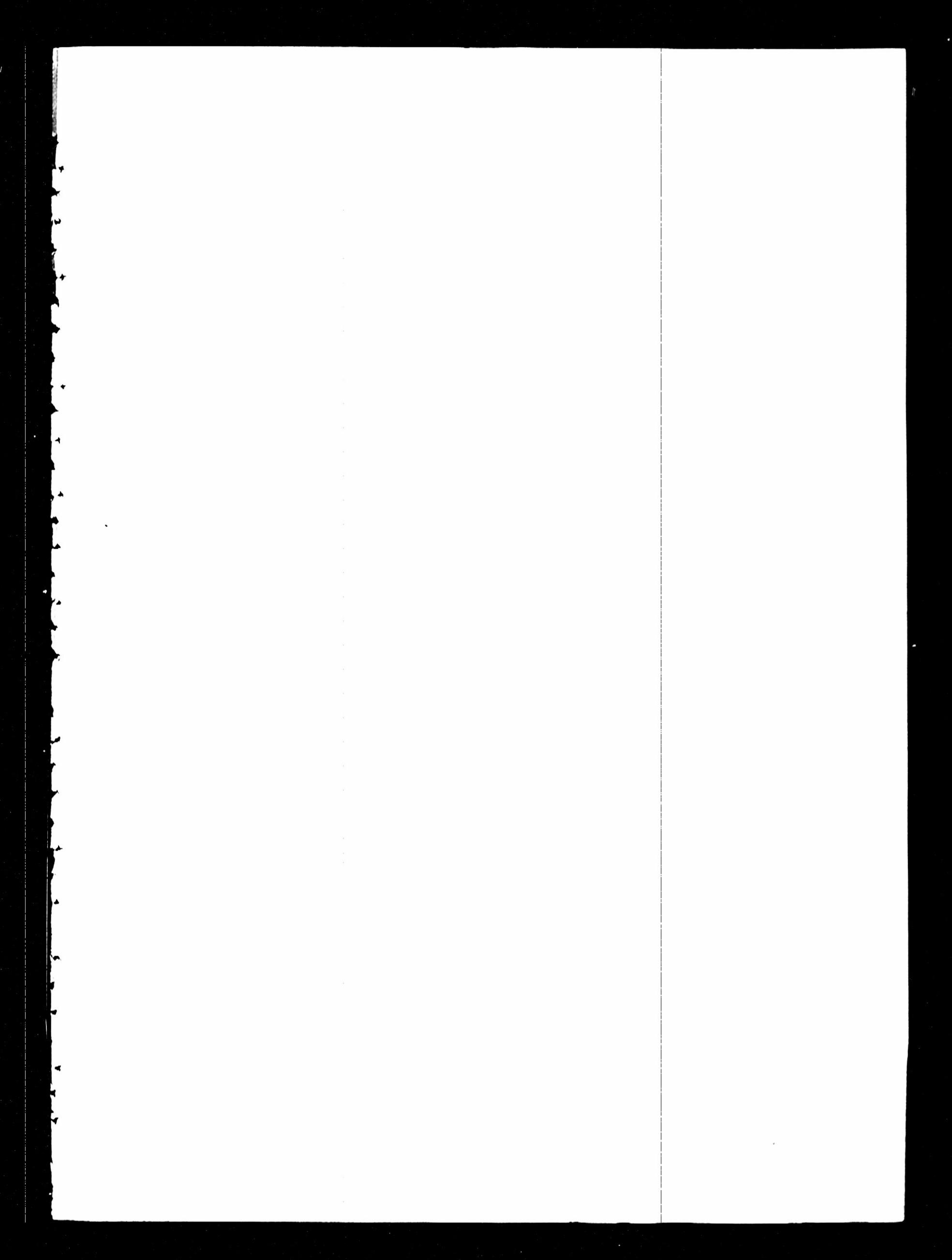
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BRIEF FOR APPELLEE

NO. 20,398

WWIZ, INC.,
Appellant,

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FEDERAL COMMUNICATIONS COMMISSION,
Appellee

ON APPEAL FROM MEMORANDUM OPINION AND
ORDER OF THE FEDERAL COMMUNICATIONS
COMMISSION

U.S. Court of Appeals
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FILED Oct 3, 1966

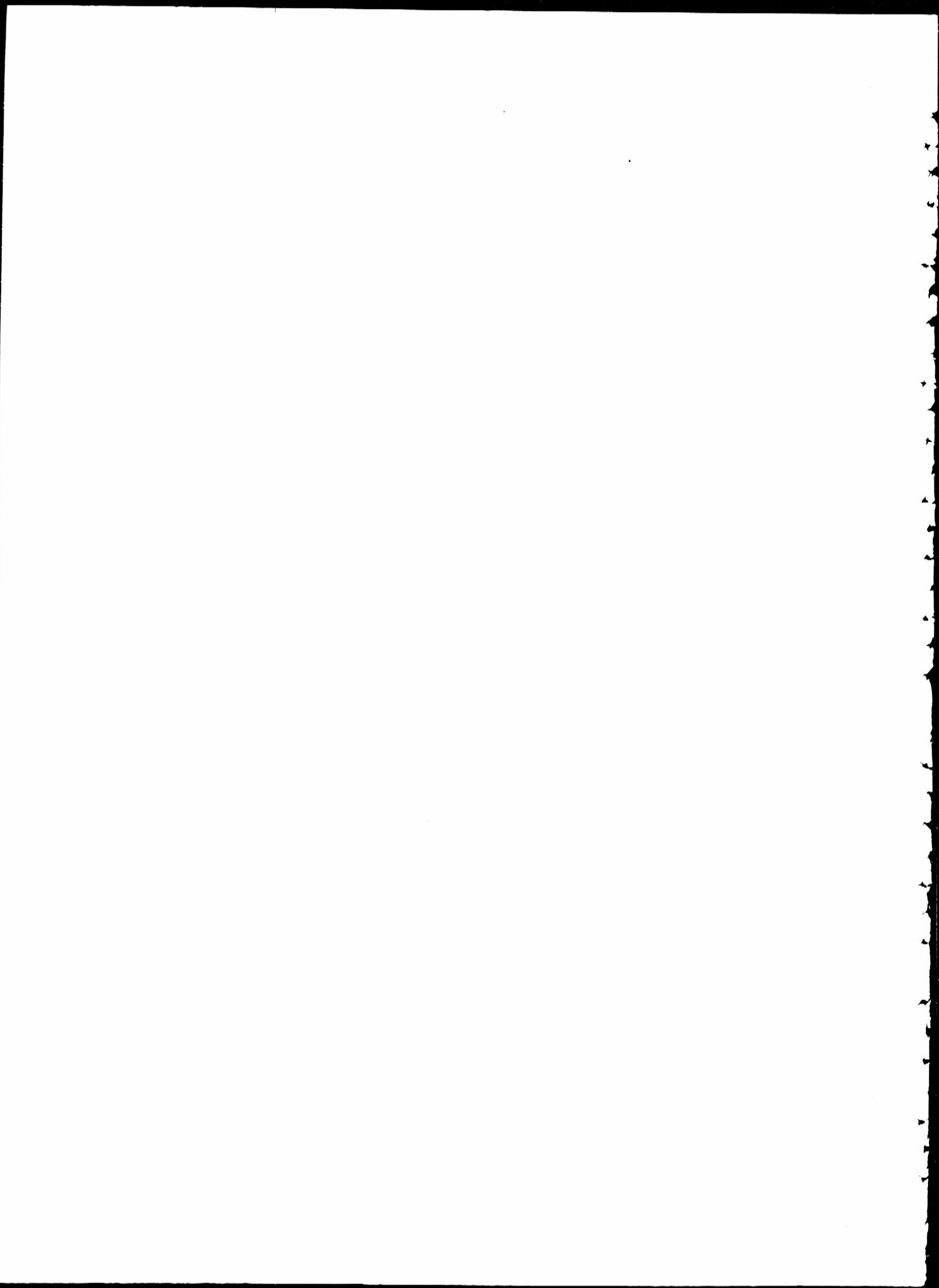
Nathan J. Paulson
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JOHN H. CONLIN,
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LENORE G. EHRIG,
Counsel.

Federal Communications Commission
Washington, D. C. 20554



STATEMENT OF QUESTIONS PRESENTED

The parties hereto entered into a Prehearing Stipulation, approved by Prehearing Order filed September 26, 1966, as follows:

Whether, in light of the reasons relied upon in
appellant's notice of appeal,^{*/} the Commission properly denied the petition of WWIZ, Inc. to (1) set aside its order of March 25, 1964, which inter alia denied WWIZ's application for renewal of license of station WWIZ; (2) to reopen the record therein, and (3) to enlarge or change the issues which governed that proceeding.

*/ Appellee does not concede any factual or legal premise implicit in the reasons advanced by appellant in its Notice of Appeal.

(i)

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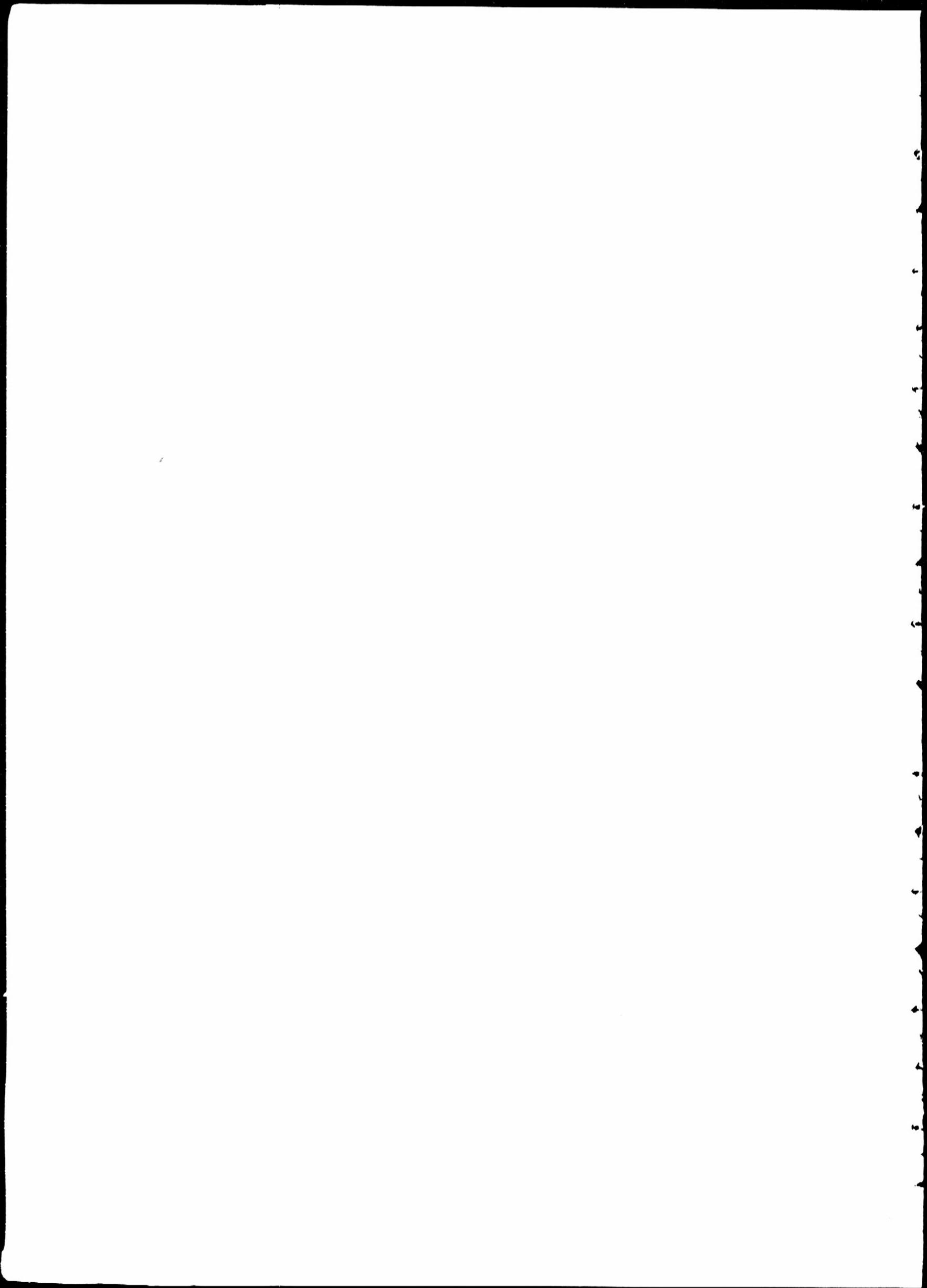
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<u>WWIZ, Inc.</u> , 36 F.C.C. 561, reconsideration denied 37 F.C.C. 685.	1, 2, 3
<u>Statutes:</u>	
Communications Act of 1934, as amended, 48 Stat. 1064, 47 U.S.C. 151 <u>et seq.</u>	
Section 307(d)	7
Section 309(e)	7
Section 503(b) (2)	7

*Cases and other authorities chiefly relied upon are marked by an asterisk.



IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 20,398

WWIZ, INC.,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee.

ON APPEAL FROM MEMORANDUM OPINION AND
ORDER OF THE FEDERAL COMMUNICATIONS
COMMISSION

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

Since appellant's statement of the case is incomplete and replete with argument, it is believed that the following will be of assistance to the Court.

This appeal stems from the application of WWIZ, Inc., filed July 15, 1961, for renewal of the license of Radio Station WWIZ, Lorain, Ohio, and an application filed June 5, 1961, for transfer of control of WWIZ, Inc. from Sanford A. Schafitz to The Lorain Journal Company (hereinafter Journal). On March 25, 1964, after an extensive hearing, the Commission denied both applications, 36 F.C.C. 561; on September 16, 1964, it denied petitions for rehearing and reconsideration filed by WWIZ and by the

Journal, 37 F.C.C. 685. These denials were based upon the Commission's conclusion that the activities of Schafitz and the Journal had resulted in a transfer of actual control of WWIZ, Inc. to the Journal without prior consent of the Commission in violation of the Communications Act and of the Commission's Rules, and that Schafitz's filing of misinformation and withholding of information in regard to these matters had constituted a clear breach of his duties and responsibilities to the Commission.

The Journal and WWIZ thereupon appealed to this Court which, in a most comprehensive and carefully considered opinion, affirmed the Commission's action.^{1/} The decision, written by Judge Leventhal on behalf of himself, Chief Judge Bazelon and Judge Wright, held that the Commission's determination was amply supported by underlying findings of fact, which, in turn, were predicated upon substantial evidence of record. A petition for rehearing en banc was denied by this Court on November 19, 1965. On April 4, 1966, the Supreme Court of the United States denied WWIZ's petition for a writ of certiorari, 383 U.S. 967, and on May 16, 1966, rehearing was denied, ___ U.S. ___, 86 S. Ct. 1455.

On June 9, 1966, WWIZ returned to the Commission with a request that it (1) set aside its order of March 25, 1964, denying WWIZ's application for license renewal, (2) reopen the record, and (3) enlarge or change the hearing issues which had governed the proceeding (R. 7-13). The basis for this request was WWIZ's con-

^{1/} Lorain Journal Co. v. Federal Communications Commission, 122 U.S. App. D.C. 127, 351 F.2d 824 (1965).

tention that lesser sanctions than outright denial of a renewal application were provided in the designation order in the Elyria-Lorain Company proceeding, 6 Pike & Fischer, R.R. 2d 191, released September 29, 1965, 30 F.R. 12639, a case which also involved questions of unauthorized transfer of control and renewal of broadcast licenses. WWIZ submitted that the Commission acted arbitrarily in framing ^{2/} issues for WWIZ which limited the hearing to renewal or denial of license renewal, but framing issues involving a choice of lesser sanctions in Elyria-Lorain where, according to WWIZ, the alleged derelictions were the same. WWIZ, therefore, requested the Commission to set aside the now final decision in regard to its renewal application, to frame new issues for it identical to those framed in Elyria-Lorain, and to reopen the record to allow WWIZ and other interested parties an opportunity to adduce evidence, cross-examine witnesses, and otherwise protect its substantial interests.

The Commission denied WWIZ's requests, stating as follows (R. 30, 31):

"The end of the judicial process cannot be regarded simply as a signal to begin anew with pleas to the agency. Only a strong and compelling case would warrant taking up the matter again after the agency and judicial process has been completed. No such showing has been made here. See Carol Music, Inc., FCC 66-649, released July 18, 1966.^{3/} No valid reasons are demonstrated by WWIZ for grant of the relief which it now seeks at such a late date. This untimeliness would warrant its denial at the threshold and for having failed to raise the question previously

^{2/} The WWIZ applications had been designated for hearing almost three years previously, on February 21, 1962, 22 Pike & Fischer, R.R. 1073, 27 F.R. 2160.

^{3/} Affirmed by an Order filed August 3, 1966, Carol Music, Inc. v. Federal Communications Commission, Case Nos. 20,331, 20332 and
(cont'd)

and at an appropriate occasion before the Commission. However, going on to the substance of WWIZ's proposal, we note that while the two proceedings appear to be similar superficially, a reading of the Orders leading to the designation of the respective proceedings for hearing discloses that the issues specified in each proceeding arose from markedly different factual situations. Unlike the WWIZ situation, the preliminary information in the Elyria-Lorain proceeding, as discussed in that order of designation, persuaded the Commission that provision should be made for the possible imposition of lesser sanctions than denial of renewal of license, should that action be deemed to be more appropriate in the circumstances reflected in the hearing record. In short, the Commission determined at the outset that the charges in the Elyria-Lorain proceeding appeared to be less serious in nature than those advanced in the WWIZ proceeding; consequently, different issues were called for in Elyria-Lorain. Furthermore, in light of our conclusion that denial of WWIZ renewal was required as the appropriate sanction upon the hearing record before us, the speculative possibility that an alternative sanction might have been specified when the matter was designated is not a relevant factor for our consideration at this time."

WWIZ appeals from this Commission action, alleging that it "was arbitrary and capricious, and amounted to a denial of appellant's constitutional right to equal protection of the law, due process, and was in effect a denial of appellant's right to a full hearing" (Brief 4).

3/ (cont'd) 20,333. This case involved an appeal similar to that of WWIZ, Inc. in that it was filed after completion of judicial review and after a subsequent and essentially repetitive petition had been denied by the Commission.

SUMMARY OF ARGUMENT

Appellant's failure to assert in timely fashion, either to the Commission or before this Court during the course of previous judicial review, Lorain Journal Co. v. Federal Communications Commission, 122 U.S. App. D.C. 127, 351 F.2d 824 (1965), cert. denied 383 U.S. 967, rehearing denied ___ U.S. ___, 86 S. Ct. 1455, its argument as to the scope of the issues in its original hearing precludes consideration of such argument now. Having exhausted every avenue of judicial review, appellant cannot be allowed at this point to begin anew.

As to the merits of appellant's contentions, the Commission was at no time precluded from considering the imposition of a lesser sanction than failure to renew. It did, in fact, grant renewal of one of the Schafitz applications being considered by it in this hearing. Also, there has been no disparate treatment as between the Commission's handling of this case and that of the Elyria-Lorain Broadcasting Company. If the same serious misconduct had been found in the Elyria-Lorain case, the same result would likely have obtained as did in the WWIZ proceeding.

ARGUMENT

I. THE COMMISSION ACTED WELL WITHIN ITS DISCRETION IN REFUSING TO REOPEN THE PROCEEDING AFTER A FINAL DECISION HAD BEEN RELEASED AND WWIZ HAD EXHAUSTED ALL POSSIBILITIES FOR JUDICIAL REVIEW.

Appellant contends that the Commission abused its discretion when, some two years after its decision and after the completion of judicial review, it refused to set aside its order and commence a new proceeding. Appellant's position appears to be (Brief p. 12) that the Commission framed the issues in the original proceeding in a manner which allegedly ruled out consideration of a lesser sanction than outright denial of license, and that WWIZ was thus deprived of a full hearing.

This matter could have been raised in the original proceeding. Appellant's failure to assert it in a timely fashion either before the Commission or this Court clearly precludes its consideration now. In effect, appellant, having exhausted every avenue of judicial review afforded by law, is now seeking to begin anew, litigating questions that it had originally either overlooked or discarded. Obviously, no system of agency procedure or judicial review could function if this kind of piecemeal review were permitted. For this reason alone, WWIZ's appeal must be denied.

There is, moreover, no merit to the contention that the hearing issues foreclosed argument as to the suitability of lesser sanctions. The purpose of the hearing issues is to specify those questions on which evidence should be adduced, and does not prohibit the Commission from exercising discretion with regard to the actionulti-

mately ordered. At the close of the proceeding, the Commission was free to choose from a number of alternatives and its decision shows that this discretion was consciously and deliberately exercised. For it did not -- as it might have -- deny each of the several applications before it. It chose instead to deny WWIZ's request for renewal while at the same time granting renewal to station WFAR, Farrell,
^{4/} Pennsylvania, also owned by Schafitz.^{4/} The severity of the Commission's action was contested in a petition for rehearing and subsequently on appeal, where this Court found "nothing to warrant judicial intervention . . . on the ground that [the Commission's] discretion has been abused." 122 U.S. App. D.C. at 134, 351 F.2d at 836.

Nor is there merit to appellant's contention that the difference in the hearing issues adopted in the recent WEOL proceeding warrants reconsideration of its own case. There the Commission noted that the evidence adduced under one of the issues might "warrant sanctions such as those imposed in WWIZ, Inc." or might call for the lesser sanction of a monetary forfeiture. Accordingly, the hearing order was formulated so as to serve both as a basis for denying renewal, 47 U.S.C. 309(e), and as a Notice of Apparent Liability pursuant to 47 U.S.C. 503(b)(2). There is no disparate treatment here,

^{4/} As other alternatives short of outright denial, the Commission could, for example, have granted renewal for a probationary short-term interval, 47 U.S.C. 307(d), or could have made a conditional grant.

^{5/} Elyria-Lorain Broadcasting Co., 6 Pike & Fischer, R.R. 2d 191, 196.

as appellant alleges; rather, the clear implication in the order is that if the record established an improper transfer of control coupled with misrepresentation and concealment, the same result reached in ^{6/} the WWIZ case would be likely to obtain.

The short of it is that appellant was found to have engaged in serious misconduct. The evidence on which this finding was based was reviewed by this Court and found to be substantial. The Commission's judgment that the license of WWIZ should not be renewed has been upheld as a reasonable exercise of discretion. Appellant's contention that the Commission has now abused its discretion by refusing to reopen the proceeding and begin anew is absurd on its face and should be summarily rejected by this Court.

CONCLUSION

For the foregoing reasons, the Commission's Memorandum Opinion and Order here appealed from should be affirmed.

Respectfully submitted,

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LENORE G. EHRIIG,
Counsel.

Federal Communications Commission
Washington, D. C. 20554

October 27, 1966

6/ On August 17, 1966, the Hearing Examiner released an Initial Decision in the Elyria-Lorain Broadcasting proceeding, 4 F.C.C. 2d ___, concluding that the Lorain County Printing and Publishing Company had never acquired or exercised either de jure or de facto control over the licensee. No exceptions were taken to this Initial Decision which, accordingly, became effective October 6, 1966.

